
Foreign Investment Real Property Tax Act (FIRPTA)

The following information is being provided as a reminder for withholding tax requirements under IRC Section 1445 on "Dispositions of United States real property interests" by a foreign person or entity. A person who meets the substantial presence test (183 day rule per IRC Section 7701) or is considered a resident alien for income tax purposes is no longer considered to be a foreign person.

A Form 8288 ("U.S. Withholding Return for Disposition by Foreign Persons of U.S. Real Property Interests"), is required to be filed by the Transferee (Buyer or Designated Agent) of the U.S. real property interest. In addition, Form 8288-A ("U.S. Withholding Statement on Disposition by Foreign Persons of U.S. Real Property Interest") must be attached to Form 8288. The amount of tax required to be withheld and paid to the IRS by the buyer is 10% of the amount realized on the transfer, or, 35% of the gain recognized by a domestic corporation, domestic partnership, domestic trust or domestic estate.

The tax on Form 8288 is due the IRS by the 20th day after the Date of Transfer. Penalty and Interest will be charged on late filed Forms 8288 (received after the 20th day from the date of transfer). An extension to file Form 8288 is permitted if the taxpayer is awaiting a response to their application for a withholding certificate. Upon receipt of an approved withholding certificate or rejection letter, the taxpayer has 20 days from the date on the certificate/letter to file Form 8288. If not filed by the extended date, penalties and interest will be charged.

Under certain categories the Transferor (foreign person or entity) or Transferee can submit a Form 8288-B ("Application for Withholding Certificate for Disposition by Foreign Persons of U.S. Real Property Interests"), to request a reduction or elimination of withholding on a transfer of a USRPI. Refer to IRC Regulation 1.1445-3 for the different categories. The IRS has 90 days from receipt of a complete 8288-B application to respond to the request. If by the 45th day the IRS determines it will be unable to process the 8288-B by the 90th day, then the IRS will mail an interim letter to the originator of Form 8288-B.

The regulations permit the transferor to request an Early Refund of the FIRPTA money upon receipt of a reduced or exempt withholding certificate when Form 8288 has been filed and paid. A refund can be made to the seller (transferor) of the property within the same year of transfer, so long as the return (Form 8288) has been filed, paid and has a withholding certificate attached.

Under IRC Section 897(i), a foreign corporation that holds a U.S. real property interest, and under any treaty obligation is entitled to nondiscriminatory treatment with such interest, can elect to be treated as a domestic corporation for purposes of this section, section 1445 and 6039C. There is no requirement for filing Form 8288 once the election has been made and approved.

Transferor's tax return responsibility upon selling real property interest

The individual transferor of the U.S. real property interest is required to file a Form 1040NR along with Schedule D, Form 6251, and Form 8288-A in order to meet the tax obligation. If the transferor is a corporation then a Form 1120F with appropriate schedules and Form 8288-A will have to be filed. (I.e. Transfer done in 2000, then in 2001 transferor will file the 1040NR or 1120F)

Transferor's tax return responsibility during ownership of real property interest

If the real property interest is used by the foreign person or entity for the production of income during the taxable year, and it is located in the U.S., IRC Section 871 imposes a 30 percent tax rate (or tax treaty rate if lower). This income is to be treated as, "income not effectively connected with a U.S. trade or business". However, the foreign person or entity can make an Election under IRC Section 871(d) to treat the real property income as income effectively connected with a U.S. trade or business, thus making it subject to graduated tax rates. The required income tax return to file will be a Form 1040NR or 1120F along with the appropriate schedules. In addition to the election, the foreign person or entity will need to file

Form W-8ECI with the payor of the income to identify it as being effectively connected income.

NOTE: Please refer to IRS Publication 515 or 519 for further information.
